NO. 87-352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,

Petitioner,

V.

RICHARD WORTMAN and HAZEL MOORE, individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,

Respondents.

On Writ of Certiorari To the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE, OF WILEY GOAD IN SUPPORT OF RESPONDENTS

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

BRENT M. ROSENTHAL*
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

Attorneys for Amicus Curiae
WILEY GOAD

January 19, 1988

* Counsel of Record

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MOTION OF WILEY GOAD FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Wiley Goad respectfully moves for leave to file a brief *amicus curiae* in support of Respondents. Respondents have consented to the filing of such a brief. Petitioner has not.

Wiley Goad is a plaintiff in a tort action for damages and the winning party in a case in which the Fourth Circuit rejected constitutional arguments similar to those made by Petitioner in the present case. *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987). If Petitioner were to prevail here, Goad's victory in the Fourth Circuit would be jeopardized.

Wiley Goad was an asbestos insulation worker for more than 20 years. In 1981 he learned that he had developed progressive and irreversible asbestos lung disease as a result of his work. Six months after the initial diagnosis, Goad filed suit against several manufacturers and distributors of asbestos in the United States District Court for the Eastern District of Texas. Personal jurisdiction over defendants in that district was uncontested and venue was proper. Although no defendant is a Virginia corporation or has a plant or principal place of business there, Goad's suit was transferred, on motion by defendants under 28 U.S.C. §1404(a), to the Western District of Virginia, where he and the physicians who treated him reside.

It was agreed that the transferee court was obliged to apply the law which the federal court in Texas would have applied, and that the Texas rule on choice of law called for application of the Texas statute of limitations. Texas follows the "discovery rule," under which the limitations period does not begin to run until a plaintiff has learned of his injury and its cause. Defendants argued, however, that it would be unconstitutional for Texas to apply its limitations rules to a case for which, it was said, Virginia law provided the substantive rules. Virginia did not adopt a discovery rule until 1985, it is unclear whether that rule has retroactive application, and arguably Goad's claim would have been barred by the Virginia limitations rules as they were when Goad incurred his diseases. The District Court and the Fourth Circuit both rejected defendants' arguments, holding that neither the Due Process Clause nor the Full Faith and Credit Clause forbade application of the Texas limitations rules or required application of those of Virginia.

Under the Fourth Circuit's decision, Wiley Goad is able to seek tort compensation from the manufacturers of asbestos products for his disease. If, however, this Court were to

adopt the constitutional *lex loci delicti* rule for statutes of limitations urged by Petitioner Sun Oil and *amicus* GAF in this case, Goad would lose that right.

The facts of Goad's case are far different from those in the case of the Wortmans. Goad seeks leave to file a brief *amicus* so that this Court, in deciding whether to adopt the sweeping constitutional rule urged by Sun Oil, may have in mind the variety of kinds of cases to which that rule would apply. In addition, Goad will argue that even if the Constitution imposes limits on the use by a forum state of its own statute of limitations, those limits are not as draconian as Sun Oil contends and any constitutional rule would not bar the forum state from applying its discovery rule on facts such as those in Goad's case.

Respectfully submitted,

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

Brent M. Rosenthal per e

BRENT M. ROSENTHAL *
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

January 19, 1988

*Counsel of Record

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BRIEF FOR WILEY GOAD AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Wiley Goad is set forth in his motion for leave to file this brief *amicus curiae* in support of Respondents, Richard and Hazel Wortman.

SUMMARY OF ARGUMENT

Petitioner Sun Oil argues that the Constitution requires the forum to apply the statute of limitations of the state "where the claim arose and claimant resides," (Brief for

Petitioner at 13), thus urging the Court to adopt as a constitutional principle the long-abandoned conflicts-of-law rule of *lex loci delicti*. *Amicus curiae* GAF contends that because the choice of which statute of limitations to apply is potentially "outcome-determinative," the Constitution prohibits the automatic application of the forum's limitations provision. Both urge that constitutional restrictions on a state's decision to apply its own statute of limitations in its courts will promote the expectations of the states and the parties, and will discourage the "evil" of forum-shopping.

Amicus curiae Wiley Goad submits in response that the forum's choice of its statute of limitations generally is not subject to constitutional scrutiny, because such statutes are usually procedural rather than substantive and are not intended by sister states to be applied in cases outside their courts. This Court has acknowledged the traditional rule that statutes of limitations are matters of remedy rather than of right, and do not create vested rights in a defendant. Neither states nor defendants have any legitimate expectation that the procedural statute of limitations of the state whose substantive law is selected by a foreign forum will be applied by that forum. Thus, neither the Full Faith and Credit Clause nor the Due Process Clause prohibits a forum from applying its own statute of limitations to a case properly within its jurisdiction. No sister state interests or expectations are impaired, and no defendant can have a protected interest in time-bar insulation or can even expect that such insulation exists.

Amicus Goad further submits that if this Court should hold that a state's statute of limitations choice is subject to constitutional scrutiny, an "outcome-determinative" formula must nonetheless be rejected. Rather, any constitutional appraisal of limitations choices should be guided by reference to the interests addressed by statutes of limitations and the purposes they seek to effectuate.

Finally, to whatever extent constitutional review should go beyond the forum interests reflected in statutes of limitations to an assessment of "fairness" to the parties, Goad suggests that the principle that claims should not be barred before they can be brought should be given paramount importance. Accordingly, a forum's decision to apply its own "discovery rule" limitations period should never be held unconstitutional.

ARGUMENT

The details of why, in our submission, the position of Petitioner is unsound and Respondents ought to prevail in this Court, are set out below. Before going into detail, however, it is useful to identify two matters that loom large over this case.

What Sun Oil is seeking in this case is truly breathtaking. Its view, if adopted, would turn somersaults with two fundamental principles of American government. First, Sun Oil seeks to have this Court impose a rigid constitutional limit on the freedom of states to decide for themselves what rule of conflict of laws they will follow with regard to statutes of limitations. Second, Sun Oil seeks to denigrate, with the opprobrious term "forum-shopping," the freedom of states to make their own choices on many legal matters and of litigants to take those choices into account in determining where to bring suit.

Until very recently it was universally understood to be the law that a forum state could and ordinarily would apply its own statute of limitations to a case that arose elsewhere, whether the effect of this was to bar a suit that was still timely somewhere else or to allow a suit that would be barred by limitations in the other jurisdiction. This Court has repeatedly held that the Constitution of the United States

permits states to follow that practice. Some conflicts scholars were and are critical of that traditional view. In the last 15 years a few states have followed the lead of the academics and have held, as a matter of their local doctrine of conflict of laws, that there are circumstances in which they would not apply their own statute of limitations, but would look instead to the limitations rule of the state where the claim arose, the state whose substantive law governs the action or the state with the most significant relationship to the parties and to the occurrence.

Petitioner does not and cannot argue here that Kansas ought to join those states that have chosen to adopt the new view. Only the Kansas Supreme Court or the Kansas legislature can make that choice. Instead Sun Oil makes the only argument open to it here. It contends that the Due Process and Full Faith and Credit Clauses require the forum state to apply the limitations provision of the state where the claim arose and the claimant resides. That to so hold would require this Court to overrule an unbroken line of decisions going from *M'Elmoyle v. Cohen*, (39 U.S.) 13 Pet. 312 (1839), to *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), does not deter Sun Oil, which sees this as a small price to pay to achieve what it considers "a consistent, realistic framework for constitutional law." (Brief for Petitioner at 13.)

The logic of Petitioner's position requires it to leave behind even the scholars whose view it purports to espouse. Even the scholars who are unhappy with the traditional view of statutes of limitations in conflict of laws do not urge as rigid or as sweeping a rule as Sun Oil and GAF now expound. And the scholars, and the lower courts that have followed them, have argued for change on the ground that it is analytically sound, not that it is constitutionally mandated.

The history of archeology is replete with the unearthing of riches buried for centuries. The archeological discovery of a new, revolutionary meaning in the Constitution of the United States is quite uncommon. The presumption is powerful that the far-reaching, dislocating construction of the Constitution now urged by Petitioner was not uncovered by judges, lawyers, or scholars in the past 197 years because it is not there.

Since neither the text of the Constitution nor the construction that has uniformly been given it lends the slightest support to Petitioner's argument, it falls back on a jurisprudence of epithets. This new constitutional rule, so it is said, is necessary to prevent "forum-shopping." This phrase (or its equivalent in verb form) is used 11 times in Petitioner's Brief and 11 more times in the brief of its friend, GAF. But as Judge Seitz observed in his dissent in *Ferens v. Deere & Co.*, 819 F.2d 423, 428 (3d Cir. 1987), whether something imvolves "unfair forum-shipping" or "skillful lawyering within established rules to obtain favorable law" is a matter of perspective.

This Court has been rightly concerned about forum-shopping between state and federal courts. *Hanna v. Plumer*, 380 U.S. 460, 467-468 (1965). The creation of diversity jurisdiction was not designed to expand or diminish the rights enjoyed by litigants under state law. A federal court sitting in diversity is intended to be "only another court of the State," *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), and identity of result in state and federal courts is a principle "important to our federalism." 326 U.S. at 110.

Choice of forum among state courts does not implicate in any way the relationship between the states and the federal courts. So long as the states are left free to be 50 laboratories, they will have different rules on many matters.

It is the essence of a federal system that this should be so. That litigants should take account of these differences in choosing where to litigate has never been thought to be the "pernicious consequence" that Petitioner piously deplores. (Brief for Petitioner at 22-23.)

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), for example, the Court held that a transfer under 28 U.S.C. §1404(a) is "but a change of courtrooms" and does not change the law to be applied. 376 U.S. at 639. The statute, the Court said, "was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege." 376 U.S. at 635. Plaintiffs were to be allowed to retain "whatever advantages may flow from the state laws of the forum they have initially selected." 376 U.S. at 633.

More recently, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984), this Court saw nothing either unusual or deplorable in plaintiff's choice of an unlikely forum to gain the benefit of a procedural rule unavailable in states with a more significant connection to the litigation.

> Petitioner's successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly, Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.

See also *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("There is nothing inherently evil about forum-shopping."). People live in one state rather than another because they like its tax laws. They do business in a state with a favorable climate toward business. They choose a state as a place to litigate because of the advantages they think they will obtain from the rules followed by that state. All of these are incidents of our federalism, and are not "pernicious."

I. A STATE COURT'S DECISION TO APPLY ITS OWN STATUTE OF LIMITATIONS TO A CAUSE OF ACTION GOVERNED BY THE SUBSTANTIVE LAW OF ANOTHER STATE IS NOT SUBJECT TO CONSTITUTIONAL SCRUTINY UNLESS THE JURISDICTION WHOSE SUBSTANTIVE LAW CONTROLS HAS CHARACTERIZED ITS STATUTE OF LIMITATIONS AS SUBSTANTIVE.

A. The Issue of Whether a Forum's Choice of Law Is Subject to Constitutional Analysis Is Determined by Whether the Law Chosen Is Characterized by Applicable State Law as Substantive or Procedural, and Not by Whether Its Application Is Potentially Dispositive of the Litigation.

In the cases in which the Supreme Court has announced that the Full Faith and Credit Clause and Due Process Clause limit a state's choice of law, the Court has been careful to limit the constitutional review to choices of substantive law. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) (issue presented was whether "application of Kansas *substantive* law violated . . . constitutional limitations on

choice of law" (emphasis added)); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) ("Our sole function is to determine whether the Minnesota Supreme Court's choice of its own *substantive* law in this case exceeded federal constitutional limitations." (emphasis added)); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936) (Full Faith and Credit Clause compels application of a sister state's statute because that statute "enacts a rule of *substantive* law" (emphasis added)). The Court has thus recognized that while a state or a litigant may have a legitimate expectation that its liberty or property rights under substantive law will be protected by sister states, the forum is entitled to use whatever procedural rules it deems expedient to resolve the litigation. The Constitution, for example, does not govern a state's choice of rules of evidence, rules of service of process, rules of pleading, or rules of discovery. As long as procedural rules are applied equally, their application is not subject to constitutional scrutiny. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Simply because it is entertaining litigation, the forum state has a legitimate reason to apply its own procedural law to cases filed in its courts.

GAF argues that the "substance-procedure" distinction articulated in the Supreme Court cases should be abandoned, and that any choice of law that may be dispositive of the litigation should be subjected to constitutional scrutiny. This "outcome-determinative" test is required, GAF argues, because if the choice of a "procedural" rule could potentially dispose of the litigation, a litigant may have a constitutionally protected expectation in its application, even in foreign courts. The traditional distinction, GAF claims, encourages forum-shopping by plaintiffs among various state courts. GAF also contends that the outcome-determinative test is easier to apply and will produce more consistent results than the substance-procedure test.

GAF's proposal, however, fundamentally misconstrues the purpose of Full Faith and Credit and Due Process limitations on choice of law. The Constitution limits a state's choice of law not in order to guarantee a particular result, but rather to promote the legitimate expectations of the states and the parties. *Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 822. Although a particular procedural rule may be dispositive of a controversy, a litigant does not necessarily have a legitimate expectation that the rule will apply in another forum. For example, a rule of evidence or of joinder may be dispositive of an action, but the litigants do not have a reasonable expectation that such rules will be applied *in the forum state*. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964) (assuming that although Massachusetts substantive law applied, its rule on the plaintiffs' capacity to sue, which would terminate the action, would not apply to cases originally filed in Pennsylvania).

As was pointed out at pp. 5-7 of this Brief, forum-shopping between states is not something with which the federal Constitution is concerned. Should it, however, be viewed as a menace, the states themselves are quite able to regulate forum-shopping by use of the forum non conveniens tool. Several states have provided for forum non conveniens dismissals by statute. *See, e.g.*, Uniform Interstate and International Procedure Act §1.05 (inconvenient forum), 13 U.L.A. 355 (West 1986), showing adoption by six jurisdictions; Cal.Civ.Proc.Code §418.10 (West 1973); Wis.Stat. 262.19 (Supp. 1975). Numerous other states employ a judicially adopted doctrine.

Interestingly, the case most often cited as illustrating the evil consequences of forum-shopping. *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), would likely result in a different outcome today, because of the use of the forum non conveniens device by a state to eliminate litigation having little contact with the forum. In *Schreiber*,

plaintiff's claim arose in Kansas. Suit was filed in federal court in Mississippi within the Mississippi six-year statute of limitations but outside the Kansas two-year period. Since Mississippi would have applied its statute, that statute still governed when the case was transferred, pursuant to 28 U.S.C. §1404(a), to the Kansas federal court. Sun focuses upon *Schreiber* as an example of the perniciousness of forum-shopping at p. 23 of its Brief, and the case has received more than its share of academic criticism. *See, e.g.*, Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 406-09 (1980).[1]

Today, however, it is entirely possible that Mississippi would dismiss such a suit on forum non conveniens grounds, if the case in fact had no contacts with Mississippi. See *Shewbrooks v. AC & S, Inc.*, No. 56,014, _____ Miss. _____, _____ So2d _____ (Miss., Aug. 19, 1987) (upholding forum non conveniens dismissal). The point is that Mississippi has the *power* to regulate forum-shopping to its pleasure. States may thus easily combat this "evil" should they so perceive it: the federal Constitution does not speak to the matter, and there is no need for this Court to read into the Constitution a proscription against forum-shopping.

GAF urges the Court to adopt its outcome-determinative test, extrapolated from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), because it is easier to apply than a substance-procedure distinction. Whether a state regards its limitations period as

1. *Schreiber* apparently did not trouble the court that decided it, for shortly afterward the Tenth Circuit held that a forum's application of "its own statute of limitations rather than the limitations period of the forum giving rise to the cause of action does not violate due process." *In re South*, 689 F.2d 162, 166 n.5 (10th Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983), citing *Allstate*, *supra*, and *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

"substantive" such that the state desires its application in proceedings in other states is, of course, easily ascertained. *See, e.g., Goad v. Celotex Corp., supra*, 831 F.2d at 511; *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *opinion on suggestion for rehearing en banc*, 713 F.2d 100 (1983), *opinion after certified question answered*, 719 F.2d 785 (1983). See also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102 (1971) (recognizing distinction between procedural statutes of limitations and substantive statute of repose as a matter of ordinary conflicts law). Moreover, as discussed below, such an inquiry readily determines whether a sister state has any "interests" to which full faith and credit must be given, and whether a party might actually have "expected" application of the sister state's statute. In any event, the outcome-determinative test has long been superseded in *Erie* jurisprudence because it does not adequately recognize the nature of the federal judiciary as an independent system for administering justice.

Many matters are controlled by federal law in diversity cases because, while surely "outcome-determinative," they nonetheless touch on the fundamental ability of the federal judicial system to regulate litigation in federal courts. For instance, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), this Court held that the federal practice of allowing the jury to decide disputed fact questions raised by the assertion of a statutory employer defense controlled over the state rule requiring the trial judge to decide such questions. The Court explained that "were 'outcome' the only consideration, a strong case might appear for saying that the federal courts should follow the state practice." *Id.*, 356 U.S. at 536-37. But outcome was *not* the only consideration. "Affirmative countervailing considerations," in that case the federal system's distribution of trial duties between judge and jury, required that identity of outcome be sacrificed when the internal adminstrative powers of federal courts would be infringed. *Id.*, 356 U.S. at 537.

In short, "[o]utcome-determination analysis was never intended to serve as a talisman," *Hanna v. Plumer*, 380 U.S. 460, 466-67, because in a sense "*every* procedural variation is 'outcome-determinative'," *Id.* at 469. As the late Henry Hart observed, the difficulty with an outcome-determinative test is that it has "no readily apparant stopping place." Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 512 (1954). Federal administrative interests may frequently demand results wholly inconsistent with the outcome-determinative approach. Sun Oil and GAF, nevertheless, would grant constitutional status to the approach for conflicts-of-law purposes—even though that approach no longer has resolving power in the very context in which it originated.

GAF has failed to demonstrate how abandonment of the principle that the Constitution limits choices of substantive but not procedural law, in favor of an outcome-determinative test, would promote the interests of federalism, fairness, or certainty of result. Having been interred for the purpose for which it was originally designed, the outcome-determinative test should not now be resurrected to govern the determination of which choice of law rules deserve constitutional scrutiny and which do not. This Court should retain the rule articulated in *Hague* and *Shutts* that a forum's choice of substantive, but not procedural, law is subject to the modest restrictions imposed by the Full Faith and Credit and Due Process Clauses of the federal Constitution.

B. Limitations Provisions Are Properly Characterized as Procedural Rather Than Substantive, Because They Are Intended To Serve Administrative Interests, and Do Not Confer Rights of Repose in Litigants.

As GAF notes, statutes of limitations have been characterized as "procedural" since medieval times. GAF Brief at 8.

This characterization of statutes of limitations as affecting the remedy and not the underlying right of action has been consistently reiterated by this Court. *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *Townsend v. Jemison*, 50 U.S. (9 How.) 407 (1850); *Campbell v. Holt*, 115 U.S. 620 (1885); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Although Sun Oil and GAF attempt to depict the principle that a statute of limitations affects the remedy and not the right of action as an abstraction unfounded on any policy or logic, this Court explained the basis for the distinction in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1949). In *Chase*, the defendant challenged on due process grounds a provision of the Minnesota Blue Sky Law that revived a cause of action that had expired under the applicable statute of limitations. The Court rejected the defendant's argument that the expiration of the limitations period provided the defendant with an enforceable, vested right to freedom from liability, and observed that limitations provisions are intended primarily to promote efficient court management by preventing the assertion of stale claims. 325 U.S. at 314. Under *Chase*, the repose enjoyed by defendants as a result of the application of limitations provisions is merely an "incidental benefit" of such statutes. *See Goad v. Celotex Corp.*, *supra*, 831 F.2d at 511. Since the defendant in *Chase* did not enjoy a "property" interest in the limitations bar, its removal by the Minnesota legislature did not deprive the defendant of any right protected by the Due Process Clause.

The Court's holding in *Chase* that access to a limitations bar is not a vested right subject to Due Process Clause protection formed the basis for a more recent Supreme Court opinion. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) the Court considered an Illinois ruling that the

failure of an administrative agency to hold a fact-finding hearing within 120 days of the filing of an administrative complaint for employment discrimination barred the claimant from pursuing any remedy. Citing *Chase*, the Court rejected the argument that the time limitation was a substantive condition upon the exercise of the underlying right. The Court distinguished between the "property right" in the employment discrimination claim possessed by the claimant and the corresponding lack of any substantive entitlement to the protection of the limitations period.

In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) the Court quoted *Chase* at length in holding that even under the Equal Protection Clause of the Fourteenth Amendment, a litigant's right to assert a limitations defense is entitled to only minimal constitutional protection. 455 U.S. at 408. It is thus clear that the holding and reasoning of *Chase* that access to a limitations bar is not a substantive, constitutionally protected right, but is rather only a by-product of a procedural device intended to aid courts, remain valid today.

In addition to its recognition in Supreme Court precedent, the rule that limitations provisions do not provide defendants with vested, substantive rights is reflected throughout our jurisprudence. For example, both the First and Second Restatements of the Conflicts of Laws explicitly recognized that an action may be maintained in the forum if it is not barred by the limitations provisions of the forum, even if it is barred in the state where the cause of action arose. *Restatement (First) of the Conflict of Laws*, §§603, 604 (1934); *Restatement (Second) of the Conflict of Laws*, §§142, 143 (1969). Similarly, Comment *a* to the *Restatement (Second) of Judgments*, §49 (1980) explains that a limitations dismissal in one jurisdiction does not preclude, by res judicata, the maintenance of the same action in

another state if the second forum's limitations provision does not bar the action. Despite the criticism duly noted by Sun Oil and GAF in their Briefs, the American Law Institute has not disturbed the traditional rule that the statute of limitations of the forum applies to a cause of action arising in another state unless the foreign state deems its limitations provision substantive.[2] This rule, of course, reflects the fundamental distinction between the interests informing statutes of limitations and those animating merits rules, a distinction with equal significance in deciding the extent and nature of constitutional restrictions on choices of each kind of rule.

Numerous states have chosen to abandon the traditional rule through the enactment of borrowing statutes, *see, e.g.*, Fla. St. §95.10 (1982), or by judicial decree, *see, e.g., Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). However, these borrowing provisions represent a policy

2. Sun Oil refers (Brief for Petitioner at 27 n.12) to the American Law Institute's consideration of a proposal to revise the traditional choice of law rule. The reference is misleading. Two separate proposals to revise §142 of *Restatement (Second) of the Conflict of Laws* have come before the membership of the American Law Institute. Both have been rejected. 54 U.S.L.W. 2597 (May 27, 1986); 55 U.S.L.W. 2653-54 (June 2, 1987). Still a third version will come to the Annual Meeting of the ALI in May, 1988. Whether it will prove acceptable to the Institute remains wholly speculative. All three versions, however, have two features that fly in the face of what Petitioner is contending for here. All three would allow a forum state to apply its own shorter limitations rule to bar an action that would be timely elsewhere and all three would recognize some circumstances in which the forum could apply its own longer statute to permit a suit that would be barred in the other state. In addition, it is worth noting that the ALI has been asked to consider various versions of what it is thought the conflicts rule ought to be. There has been no hint in any of these that the Constitution sets limits on a state's freedom to choose which limitations rule it will apply.

decision on the part of such states not to entertain litigation deemed stale by the state in which the cause of action arose. They do not imply recognition that a defendant in a claim arising in a foreign state enjoys a substantive right to repose conferred by the limitations provision of that state. *See, e.g., Warner v. Auberge Gray Rocks Inn , Ltee.*, 827 F.2d 938 (3rd Cir. 1987) (holding that, despite the borrowing rule adopted by the New Jersey Supreme Court in *Heavner, supra*, the New Jersey statute of limitations would apply to a cause of action arising in Quebec).

Any state desiring to confer upon potential defendants a vested, substantive right to repose from litigation based on a cause of action arising within its borders may do so simply by declaring its statute of limitations to have that effect. For example, in *Jenkins v. Armstrong World Indus., Inc.*, 643 F.Supp. 17 (D.Idaho 1985), *vacated on other grounds sub nom Meyers v. Armstrong World Indus., Inc.*, 820 F.2d 329 (9th Cir. 1987), a substantive right to repose *was* conferred upon the defendant by the Idaho statute of limitations; consequently, the trial court's decision to apply the Idaho limitations provision to a case originally filed in Texas was probably correct on that basis. Similarly, the result of *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), much maligned by GAF and Sun Oil in their Briefs, would have been different had Virginia chosen to endow the defendant with a vested right to repose by declaring its limitations provisions to be substantive. Sun Oil's real quarrel in this litigation is not with the Kansas Supreme Court; it is with the legislatures of Texas, Oklahoma, and Louisiana, for failing to provide litigants such as Sun Oil with a substantive right to repose on the type of claim presented in this case.

As noted in Part I(A) of this Brief, the labeling of a rule of law as "substantive" or "procedural" serves a very real purpose: it signals the significance of the interest affected

by the rule. The characterization of statutes of limitations as "procedural" is no accident; it represents a considered judgment of the significance of the statute to the litigants. By declaring their statutes to be "procedural" and not "substantive," Texas, Oklahoma, and Louisiana have made clear that the purpose of their limitations provisions is to protect their courts from stale claims, and not to provide defendants with a substantive right to repose that may be asserted in other states. The application by Kansas of its own limitations provision to the claims against Sun Oil, rather than of the procedural statutes of the various jurisdictions in which the claims arose, impaired no constitutionally protected right of Sun Oil and thus was constitutionally permissible.

C. The Application of the Forum's Statute of Limitations Does Not Impair Sister-State Interests in Violation of the Full Faith and Credit Clause.

As demonstrated in Part I(B) of this Brief, statutes of limitations are designed primarily to conserve judicial resources by relieving the forum state of the burden of entertaining cases that it considers stale. Neither Sun Oil nor GAF is able to articulate how the decision of the forum state that the facts of litigation arising in another state are not stale impairs any interest of the sister state. Indeed, by characterizing its statute of limitations as procedural, the sister state has declared and recognized that its statute need not and may not be applied beyond its borders. In the instant case, Texas, Oklahoma, and Louisiana have conflicts-of-laws rules regarding statutes of limitations similar to that in Kansas;[3] thus, interstate comity is completely unaffected by Kansas' application of the traditional rule.

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3. *Francis v. Herrin Transportation Co.*, 432 S.W.2d 710 (Tex. 1968); Okla.Stat.tit.12 §105 (1981) (directing application of limitations

On the other hand, were this Court to adopt the rule of *lex loci delicti* as a constitutional imperative with respect to statutes of limitations, as advocated by Sun Oil, the forum state's interest would be seriously impaired, because the forum state would be compelled to entertain actions arising in other states that it might otherwise dismiss as stale. Under Sun Oil's interpretation of the Full Faith and Credit Clause, the forum state could not determine for itself the point at which claims and evidence become too stale to litigate. For example, Louisiana, with a one year limitations provision applicable to personal injury claims,[4] would be required to entertain two-year-old actions from neighboring Texas,[5] four-year-old actions from neighboring Arkansas,[6] and six-year-old actions from neighboring Mississippi.[7] Limitations provisions would no longer serve the policy of effective court management in the states that enacted them. Such a result would truly impair state interests that the Full Faith and Credit Clause was designed to protect, and must be prevented by this Court.

Unless a state desires the application of its law in a proceeding in a sister state, and at the least signals such a desire, then the Full Faith and Credit Clause cannot ***require*** its application. Given the age and widespread acceptance of the traditional choice of law rule, states that characterize their

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3. (Continued) provision of state in which cause of action arose only if it is *longer* than Oklahoma's); *Istre v. Diamond M. Drilling Co.*, 226 So.2d 779, 794-99 (La.Ct.App. 1969)

4. La.Civ.Code Ann. art. 3536 (1953)

5. Tex.Civ.Prac. & Rem.Code §16.003 (1986)

6. Ark.Stat.Ann. §37-206 (1962)

7. Miss.Code.Ann. §15-1-49 (1972).

statutes of limitations as procedural cannot reasonably be said to desire the application of such statutes in foreign forums. Predictably, Sun Oil and GAF are unable to demonstrate such an intention on the part of Texas, Oklahoma, and Louisiana. The application of the forum's statute of limitations under these circumstances thus cannot be said to impair sister-state interests in violation of the Full Faith and Credit Clause.

D. The Application of the Forum's Statute of Limitations Does Not Defeat the Legitimate Expectations of Defendants in Violation of the Due Process Clause.

The Due Process Clause protects a litigant from a choice of law that is arbitrary or fundamentally unfair. *Allstate Ins. Co. v. Hague*, *supra*, 449 U.S. at 313. "When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 822. Since the defendant does not have a vested right to invoke a limitations provision characterized as procedural by the state in which the cause of action arose, it cannot claim a legitimate expectation that the statute will be applied in a foreign state. Since the application of the traditional choice-of-law rule regarding statutes of limitations thus cannot conceivably be considered to violate any legitimate expectation of a defendant, it cannot be held to violate the Due Process Clause.

GAF's suggestion that a defendant has an interest protected by the Due Process Clause in the application of a particular statute of limitations is particularly troublesome in light of the frequent difficulties that the courts encounter in determining where a cause of action arose. For example, GAF is a defendant in several class-action lawsuits in which the plaintiffs seek to recover the cost of removing from their

buildings asbestos-containing materials manufactured by GAF and other companies. The cause of action may be said to arise where the buildings are located, or where the materials were manufactured, or where the materials were designed, or where the corporate decision to place the products on the market was finalized. GAF cannot legitimately claim to have developed an expectation in the application of the statute of limitations of any of these particular jurisdictions. In any event, it is inconceivable that GAF's conduct was influenced in any manner by the length of the statute of limitations in any of these states. *See, e.g., Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at 316. Thus, GAF's claim that it has developed a constitutionally protected expectation and interest in the application of a particular statute of limitations is purely contrived and fictional. In fact, the exact reverse is true: GAF has known since it first marketed asbestos products that it could be sued in a transitory cause of action for harms resulting from those products, and that the substance-procedure dichotomy would govern the choice of a limitations period. Similarly, Sun Oil has always known it could be sued in Kansas on a Texas oil and gas lease and be governed by the Kansas statute.[8]

This Court should not afford constitutional protection to "substantive" rights claimed by defendants that have not been conferred by state law. Defendants have been on notice of the traditional choice-of-law rule governing statutes of limitations for over 150 years; to claim surprise from the application of the rule is disingenuous at best. This Court should thus decline to allow defendants to claim entitlement to a particular state's limitations bar as a Due Process "right."

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8. The Kansas Supreme Court's treatment of the Kansas borrowing statute, a law which would seem on its face to dictate the result that Sun Oil seeks through this constitutional challenge, is, of course, outside the scope of this brief.

II. EVEN IF THE CONSTITUTION LIMITS THE FORUM'S CHOICE OF PROCEDURAL RULES, A FORUM'S CHOICE OF ITS STATUTE OF LIMITATIONS SHOULD ALMOST NEVER BE HELD UNCONSTITUTIONAL

A. Because Procedural Rules Are Designed to Protect Interests of the Forum, Constitutional Restrictions on Choices of Procedural Law Are Even More Modest than Constitutional Restrictions on Choices of Substantive Law.

As detailed above, *amicus* Wiley Goad believes that the Constitution does not speak to statutes of limitations. Should the Court hold, however, that a state's choice of a limitations period to control litigation properly in its courts is subject to constitutional scrutiny, the wooden rule suggested by Petitioner and *amicus* GAF must be rejected.

The constitutional review of a state's choice of "substantive" law–that is, the law affecting the parties' theories of liability, damage entitlements, and the like–is fundamentally different from the review, if any, of a state's choice of a limitations period. Statutes of limitations implicate interests of the forum *qua* forum, and are rules directed primarily toward judicial administration rather than toward the parties. Any constitutional strictures this Court places on statutes of limitations choices, therefore, should be much looser than the already "modest" restrictions governing choice of the law directed at the parties' interests. See *Shutts, supra*, 472 U.S. at 821.

As this Court has repeatedly recognized, see Part I above, statutes of limitations are, first and foremost, administrative expedients. The function of statutes of limitations as tools

for litigation management is reflected most significantly in the fact that this very nature makes them arbitrary and illogical:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.

Chase Securities Corp. v. Donaldson, supra, 325 U.S. at 314.

Administrative tools that, by their very nature, operate without reference to the "justness" of a claim or the merits of the elements of a cause of action, should obviously be treated differently, for purposes of evaluating a forum's choice of rules, from the choice of rules shaping the merits of a case. The conflicts-of-law rule that Petitioner and *amicus* GAF would enshrine in the Constitution, however, lumps statutes of limitations into the same evaluative inquiry as merits issues. This approach ignores the fact that statutes of limitations are unrelated to the interests implicated and effectuated by rules governing merits issues.

This Court has explicitly rejected the mechanistic rule suggested by Sun Oil and GAF. In *Allstate, supra*, Justice Brennan noted for the plurality that even though the accident which killed plaintiff's decedent occurred in Wisconsin, defendant could not be sure that Wisconsin law would apply to a resulting lawsuit simply by virtue of the fact that the claim "arose" there. His opinion went on to confirm that a rigid test for governing law must yield to a test which is

sensitive to the nature of the different issues presented in a particular case:

> Such an expectation [that Wisconsin law would necessarily govern] would give controlling significance to the wooden lex loci delicti doctrine. While the place of the accident is a factor to be considered in choice-of-law analysis, to apply blindly the traditional, but now largely abandoned, doctrine, Silberman, supra, n.11, at 80, n.59; see n.11, supra, *would fail to distinguish between the relative importance of various legal issues involved in a lawsuit* as well as the relationship of other jurisdictions to the parties and the occurrence or transaction.

Id., 449 U.S. at 316 n.22 (plurality opinion) (emphasis added) (citing Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L.Rev. 33, 80 n.259 (1978)). Surely, then, an approach rejected for its failure to discriminate meaningfully among the merits issues in a case cannot be held to be constitutionally mandated for procedural matters, which implicate interests different from those informing merits rules.

B. Since Statutes of Limitations Primarily Implicate Forum Administrative Interests, a Forum's Application of Its Own Limitations Period Should Almost Never Be Held Unconstitutional

A defendant challenging the forum's selection of its own law on limitations bears the burden of establishing an infringement of the Full Faith and Credit Clause. *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U.S. 532, 547-48 (1935); *Allstate, supra*, 449 U.S. at 325 n.13 (Stevens, J., concurring). This burden can almost never be met,

for while the forum has plain interests in regulating the litigation otherwise properly in its courts, a sister state will have no administrative interest in litigation outside its courts –regardless of whether *it* views the litigation as "stale." A state obviously takes no administrative interest in the conduct of litigation outside its courts.

Conversely, if the sister state's statute of limitations reflects substantive interests, e.g., repose rights, the sister state is easily capable of ensuring its application in foreign proceedings by declaring it to be substantive. As discussed above, this method has been followed for many decades. In the absence of such action, a state knows and expects that its statute will normally not be applied in other courts, for the obvious reason that the administrative considerations reflected in the statute are of concern only to the forum state.

The Due Process clause will prevent a forum's application of its own *substantive* law only if that application is arbitrary or fundamentally unfair. *Allstate*, *supra*, 449 U.S. at 313 (plurality opinion). Justice Stevens has questioned whether a "judge's decision to apply the law of his own State could ever be described as wholly irrational." *Allstate*, *supra*, 449 U.S. at 326 (Stevens, J., concurring). Forum administrative interests are sufficient to afford presumptive validity to the forum's selection of its own substantive law. *Id*.

Certainly then, there should be an even stronger presumption of validity to a forum's choice of its own limitations law. If administrative interests of the forum are normally sufficient constitutionally to support a choice of the law governing the rights and obligations of the parties, then surely those interests, which are at the heart of statutes of limitations, should validate the forum's use of its own limitations period.

Since it cannot be arbitrary for a forum to apply its own limitations provision, a defendant should have to demonstrate gross, fundamental unfairness in the use of that provision to invoke Due Process Clause relief. As previously demonstrated, concerns about "fairness" in the statute of limitations context are attenuated at best: a defendant has no vested right to the freedom from liability granted by a time bar, *Chase*, *supra*, and the purposes of statutes of limitations are in any event unrelated to the interests of the parties and the separation of just and unjust claims. Nonetheless, certain concerns may be raised about "fairness" in the choice of merits rules, and it is perhaps possible, though *amicus* Goad submits highly unlikely, that such concerns could call into question the forum's use of its own limitations law.

The *Chase* Court suggested that "special hardships or oppressive effects" might, if shown, require a different result. *Chase*, *supra*, 325 U.S. at 316. *Chase*, however, involved a defendant being subjected to new liability after coming within the protection of a time bar; such a situation is different from, and intuitively much more troubling than, a defendant failing to gain the protection of a time bar he never had for certain in the first place. In any event, the Court found no special hardships or effects, and tellingly noted also that the defendant could not legitimately claim to have premised its behavior on the protection of the time bar it possessed. *Id*., 325 U.S. at 316. Statements by defendants, such as *amicus* GAF, that they plan their actions under assumptions of time-bar protections they have never possessed obviously must be given even less credence.

In *Allstate*, *supra*, the Court wrote that "unfair surprise" is the "central concern" of Due Process review of choice-of-law decisions. *Id*., 449 U.S. at 327; see also *Shutts*, *supra*, 472 U.S. at 822 (when considering fairness in Due Process context, "an important element is the expectation of the

parties."). As detailed above, neither Sun Oil nor GAF nor any defendant in the usual case will be able to claim such surprise since defendants have always known they could be sued on transitory causes of action wherever jurisdiction and venue were proper and that the statute of limitations of the forum would likely govern.

In sum, a defendant bears an extremely heavy burden in gaining constitutional negation of the forum's application of its own statute of limitations. The Full Faith and Credit Clause will never be infringed, because a sister state has no interest in the docket management of the forum state; any substantive repose interests are readily given effect by the longstanding device of labeling the statute "substantive." A forum's choice of its own merits rules has presumptive validity under the Due Process Clause; a choice of the local statute of limitations, then, should be automatically approved. Fairness concerns are nonexistent since no defendant can claim surprise at a rule which GAF acknowledges originated in medieval times. Whatever the wisdom of the substance-procedure rule, there is simply no constitutional "unfairness" about its operation.

C. A Forum's Application of Its Own "Discovery Rule" Can Never Be Unconstitutional

Should this Court hold statutes of limitations subject to the same constitutional review as that applicable to merits issues, *amicus* Goad respectfully submits that at the very least, the outcome-determinative test profferred by Sun Oil and GAF should not apply to foreclose a forum's application of a limitations period containing a discovery rule.

Wiley Goad was a commercial asbestos insulator. He alleges that he developed asbestosis, and other irreversible diseases. These diseases manifested themselves long after his exposure

to asbestos ceased and long after the tortious acts he complains of were committed. Mr. Goad resides in Virginia, but filed suit for his injuries in Texas–where jurisdiction and venue were undisputed–to gain application of the Texas statute of limitations. At the time suit was filed, Texas law contained a "discovery rule" as part of its statute of limitations; Virginia law did not.

Discovery rules, of course, generally date the accrual of a cause of action from the moment a plaintiff knew or should have known of his injury. The rule is most frequently applied in cases where the injury is inherently unknowable until after the limitations period would normally run, such as medical malpractice or latent disease tort cases. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis claim under the Federal Employers' Liability Act); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975) (asbestosis case under Minnesota law); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (Ky. 1979) (mesothelioma caused by asbestos exposure). The vast majority of American jurisdictions now apply a statutory or judicial discovery rule to latent injury cases, and commentators overwhelmingly favor the doctrine. *See, e.g., Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 116 n.31, 117 n.32 (D.C. Cir. 1982).

If Due Process Clause appraisal of a forum's choice of its own limitations law ultimately turns on visceral notions of fairness–*amicus* Goad believes the inquiry ends long before such notions are reached–then Goad submits that a forum's application of a discovery rule will always be "fair" and hence constitutional. Affording a plaintiff a day in court, to sue for injuries inherently unknowable until perhaps decades after the tort occurs, is intuitively fair; indeed, it is the only fair resolution in the latent-injury context. *Urie v. Thompson, supra*, 337 U.S. at 169-170.

Dramatizing judicial recognition of the need for the discovery rule is the academic recognition that the latent injury context is one area in which it is unquestionably not unfair to apply the forum's statute. The recent Uniform Conflict of Laws–Limitations Act, 12 U.L.A. 50 (Supp. 1987), promulgated by the National Conference of Commissioners on Uniform State Laws in 1982, provides that generally, a forum must apply the limitations period of the state whose substantive law will govern the claim, unless the forum determines that the sister state's law is unfair. 12 U.L.A. at 52. "Unfairness" can occur under the act when the sister state's limitation period is "substantially different" from that of the forum and does not afford "a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim. . . ." *Id.* at 52. The principal draftsman of the Uniform Act, Judge Robert A. Leflar, has pointed to the precise situation Wiley Goad confronted in explaining why the Uniform Laws Commissioners chose to make an exception to their rule for cases where "unfairness" would result:

> Not all jurisdictions, however, have adopted the "discovery rule." In some, the statute is deemed to begin running at the moment the tortious act was done (when the tort occured), even though the victim could not know of the harmful consequences until some later time, perhaps after the statutory period had run. In these cases, a court of another state might well find "unfairness" in the first state's accrual rule, in that it "has not afforded a fair opportunity to sue upon . . . the claim."

Leflar, *The New Conflicts-Limitation Act*, 35 Mercer L.Rev. 461, 480 (1984). The rule for which Sun Oil contends here would make unconstitutional the escape hatch the Uniform Laws Commissioners left for cases of this kind.

As Sun Oil and GAF contend that the Constitution follows in lockstep with trends in choice-of-law analysis, the National Commissioners' recognition that a forum should be free to apply its own discovery rule must be made a part of any constitutional rule elucidated by this Court.[9] The discovery rule is eminently fair, and a forum's choice of the rule can never be unconstitutional.

If courts are suddenly to be put to the task of evaluating the constitutionality of applying their own statutes of limitations, an outcome-determinative test is ill-suited for such work. Proper analysis will focus on the nature of statutes of limitations. Under such analysis, the forum's use of its own rule will rarely be improper, and use of a local discovery rule will never offend the Constitution.

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9. The new Uniform Act is paralleled by an emerging trend simply to apply the longer of two conflicting statutes of limitations as a matter of policy to afford decision on the merits. *See, e.g., Tomlin v. Boeing Co.*, 650 F.2d 1065, 1072 (9th Cir. 1981); *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir. 1980); *Sprung v. Rasmussen*, 180 N.W.2d 430 (Iowa 1970); *Adams v. Little Missouri Mineral Co.*, 143 N.W.2d 659 (N.D. 1966); Okla.Stat.tit.12 §105 (1981). This trend also supports the conclusion that forum use of a discovery rule is per se constitutional.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, *amicus* Wiley Goad respectfully prays that the decision of the Kansas Supreme Court be AFFIRMED.

Respectfully submitted,

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

Brent M. Rosenthal pmca

BRENT M. ROSENTHAL*
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

Attorneys for Amicus Curiae

WILEY GOAD

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* Counsel of Record